

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 69717-S76D BY TOM AND BETTY)	
WILSON AND JOHN AND JAN WILSON)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 10, 1990 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application For Beneficial Water Use Permit No. 69717-s76D is hereby granted to Tom and Betty Wilson and John and Jan Wilson to appropriate 58 gallons per minute up to 21.3 acre-feet of water per year of water for the purpose of sprinkler irrigation on a total of 8.52 acres located in the E½NE¼SW¼ of Section 5, Township 35 North, Range 27 West, in Lincoln County, Montana. The source of water is Pinkham Creek, a tributary of Lake Koocanusa and shall be diverted for use from April 15 to September 15 inclusive of each year at a point in the

CASE # 69717

N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 5. This permit has a priority date of September 13, 1988 at 1:55 p.m.

This permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department in issuing this permit acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

C. If, at any time after this is permit issued, a written complaint is received by the Department alleging that Permittees' diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If, during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittees to show-cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the


hearing examiner determines that no existing water rights are being adversely affected.

D. This permit is subject to the condition that the Permittee shall install a continuous recorder in order to allow the flow rate and volume of water diverted to be recorded. The Permittees shall keep a written record of the flow rate and volume, including the period of time, of all water diverted from Pinkham Creek. Flow measurements shall be taken and recorded every two days and shall be submitted to the Department twice a year. The first report shall be due July 15 and the second on September 15 of each year. The report shall be sent to Department of Natural Resources and Conservation, Water Resources Field Office, P.O. Box 860, Kalispell, MT 59903.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18 day of ^{June} ~~May~~, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served by mail upon all parties of record at their address or addresses this 18 day of June, 1990 as follows:

JOHN AND JAN WILSON
TOM AND BETTY WILSON
P. O. BOX 751
EUREKA MT 59917

Harry D. Sutley
4015 Fir Forest
Spring, TX 77379

Harry D. Sutley
359 Pinkham Road
Rexford, MT 59930

Chuch Brasen, Field Manager
Kalispell Water Resources Field Office
P.O. Box 860
Kalispell, MT 59903



Cindy Campbell
Secretary

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 69717-s76D BY TOM AND BETTY)
WILSON AND JOHN AND JAN WILSON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 19, 1989, at 1:00 P.M. in Kalispell, Montana.

APPEARANCE

Tom and Betty Wilson, the Co-applicants in this matter, were represented by themselves.

John and Jan Wilson, the other Co-applicants in the matter, did not appear.

Harry D. Sutley, Objector, appeared pro se.

David M. Schmidt, Water Right Specialist with the Kalispell Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereinafter referred to as Department or DNRC) appeared as DNRC staff witness. Also present at the hearing was Chuck Brasen who is the Field Manager in the Kalispell Water Rights Bureau Field Office.

EXHIBITS

The Applicants offered two exhibits to be entered into the record. Applicants' Exhibit 1 is a hand-drawn map indicating the

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north direction, point of diversion, place of use, John Wilson and Tom Wilson homes, the cabin of Les Sederdahl, Pinkham Creek, Homestead Drive, Sutley's Dam, pump house, and the irrigation pipe. It was testified to by the Applicants that the map was not drawn to scale.

The Applicants' Exhibit 1 was accepted into record without objection.

Applicants' Exhibit 2 is a notarized statement from a Mr. John H. Leib. Exhibit 2 was objected to by the Objector, Sutley, because Mr. Sutley does not agree with one of Mr. Leib's statements in the letter. (See preliminary matters for further details.)

The Objector offered the following exhibit into record.

Objector's Exhibit 1 is a computer printout from Fort Collins. Exhibit 1 was objected to by the Applicant, Mr. Wilson, because Mr. Wilson does not believe the figures. (See preliminary matters for further details.)

The DNRC offered two exhibits into the record.

The DNRC's Exhibit 1 was the DNRC application file and contents, Application No. 69717-s76D.

The DNRC's Exhibit 1 was accepted into record without objection. The DNRC file is, therefore, made a part of the record in its entirety.

The DNRC's Exhibit 2 is a report dated June 8, 1989, by David M. Schmidt. The report consists of a written statement, photocopies of two quad maps (one is a drainage basin map and the

other is of the area of impact), and nine photos showing the Applicants' place of use and point of diversion, and the Objector's place of use, point of diversion, and the flows of the Pinkham Creek as of May 24, 1989.

The DNRC Exhibit 2 was accepted into the record without objection.

PRELIMINARY MATTERS

During the course of the hearing, the Hearing Examiner deferred ruling on two objections. These two objections will be ruled on herein.

The first objection was made by Objector Sutley to what has been marked as Applicants' Exhibit 2 (a letter written by Mr. John H. Leib). Mr. Sutley did not agree with the one statement in the letter which states, "If Wilson's water rights are approved I don't think it will have an adverse affect on the creek or any of the users."

Mr. Leib's letter is a certified statement of his knowledge of the source stream. I am going to accept it into the record marked as Applicants' Exhibit 2. It will only be given the evidentiary value that it represents.

The second objection was made by the Applicant to what has been marked as Objector's Exhibit 1, a computer printout from Fort Collins, Colorado, showing the percentages and number of acres clear cut. The reason Mr. Wilson objected to the Objector's Exhibit 1 was he did not agree with the figures. He

did think as much area had been clear cut as this exhibit indicates.

Exhibit 1 of the Objectors has been written on in pen. I have no way of knowing who has written these figures nor whether or not the figures are correct or even if these figures are applicable to the Pinkham Creek drainage.

Because all parties to the hearing have stipulated not to follow the statutory rules of evidence, I have decided to allow Exhibit 1 of the Objector into the record for whatever appreciative value it may have.

PROPOSED FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 69717-s76D was duly filed with the Department on September 13, 1988 at 1:55 P.M.

3. The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on December 1, 1988. A timely objection was received from Harry D. Sutley. A Notice of Hearing and

Appointment of Hearing Examiner was duly served on all parties on May 11, 1989.

4. The source of water for the proposed appropriation is Pinkham Creek, a perennial stream, a tributary of Lake Koocanusa.

5. The application was filed to obtain a permit for the use of 58 gallons per minute (gpm) up to 23.8 acre-feet of water per year from Pinkham Creek, a tributary of Lake Koocanusa. The point of diversion is to be in the $N\frac{1}{2}S\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$ of Section 05, Township 35 North, Range 27 West, MPM, Lincoln County, Montana. The water is to be used for irrigation of alfalfa pasture on 9.52 acres in the $E\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$ of Section 05, Township 35 North, Range 27 West, MPM, all in Lincoln County, Montana. The period of use of the water is from April 15 through September 15, inclusive of each year. The Applicants testified at the hearing that they would only be irrigating 8.52 acres because one acre was too steep to irrigate. The Wilsons testified they could beneficially use water from Pinkham Creek for a shorter time period than that requested in the application.

The Wilsons described the project as using a three horse-power electrically driven pump. The sprinkler pipe will be two to four inches in diameter. It will operate once a day from April through August and the crop will be 80% alfalfa and 20% grass.

6. The amount of water applied for appears reasonable for the use intended.

7. There appears to be some question as to whether or not there is sufficient unappropriated water in Pinkham Creek to sustain the amount of water claimed and the amount already permitted at the time the Applicant seeks to appropriate water according to testimony based on the Objector's observation and experience on living in the area since 1980 or for the last nine years.

8. Mr. Wilson responded by saying that he has lived in this area for 26 years and that he believes there is water available most years.

Applicant's Exhibit 2 would also support Mr. Wilson's observation. The letter from Mr. Leib states he, Mr. Leib, does not believe the granting of a water right to the Wilsons would adversely affect anyone.

9. In reviewing the Department records (Exhibit 1) on Pinkham Creek, I find a total of 35 water rights totaling 4.61 cubic feet per second (cfs) claimed or permitted on this drainage. Out of the 4.61 cfs, seven water rights are for domestic (0.19 cfs), thirteen water rights for stock (no rate or volume listed), thirteen water rights for irrigation (4.39 cfs), one water right for recreation (0.03 cfs), and one water right for fish and wildlife (no rate or volume listed). (NOTE: The total number of cfs is an estimate because there is no flow or volume for the stock usage.) All figures have been rounded to the nearest hundredth place.

10. In the Department's Exhibit 2, Mr. Schmidt has estimated the flows of Pinkham Creek at the time of his investigation (May 24, 1989) to be 50 cfs.

11. The Objector testified that when he (Mr. Sutley) first purchased the property, he was getting 50 tons of hay to the acre and in the past couple of years he has only been getting around 12 tons to the acre. This is due to the fact that he believes less water has been available to irrigate his property.

12. The Objector testified he has moved from the area because he could no longer make a living on the ground.

13. The Objector also testified that the U. S. Forest Service has allowed a total of 10,361 acres to be clear cut (logged off) which is 28% of the total drainage area (37,387 acres). This caused the release or run-off of water to occur earlier in the year. The clear cutting started in 1965 and has continued to the present.

14. The Wilsons testified that while they did not believe 10,361 acres have been clear cut, they did not think it would have much effect because the new stand of trees was somewhere around six to eight feet tall in these areas.

15. Mr. Sutley stated that he did not believe six to eight foot trees would provide the same coverage as a mature tree.

16. There was some testimony that the run-off of water occurs around the end of May and only lasts about two weeks.

17. There was also testimony given which indicated there was water available at least some years all the way to the first part of August.

18. There was testimony given that there is water that flows past Mr. Sutley's diversion, but it cannot be taken by Mr. Sutley because of the way the weir is designed at the Sutley diversion.

19. The Objector testified to the fact that water is available during a portion of the year. When questioned, the Objector stated he felt water would only be available to late May or early June.

20. The Applicant proposed to use the water to irrigate alfalfa and grass for hay and pasture which is a beneficial use.

21. The record does not reflect any other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply;

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water for irrigation is a beneficial use of water. See § 85-2-102(2), MCA.

5. Section 85-2-311(1)(c) -- The Applicant has shown by substantial credible evidence that the diversion, construction, and operation of the appropriation works is adequate. (See Finding of Fact 5.)

6. The proposed use will not interfere unreasonably with other planned uses or developments for which water has been reserved. (See Findings of Fact 8, 9, 10, and 21.)

7. Section 85-2-311(1)(a), MCA, requires that there be unappropriated waters available for the Applicant's proposed use

in the amount the Applicant seeks to appropriate throughout those periods proposed for use of the water. Direct testimony by the Applicant and Department indicates there is appropriable water in the source of supply during the time and in the amount the Applicant seeks to appropriate it. The Applicant did prove the criteria set forth in § 85-2-311 (1)(a), MCA. (See Findings of Fact 8, 9, 10, 17, 18, and 19.)

8. Objector Sutley questioned water availability, but did not present any evidence to contradict that of the Applicant. In fact, he has testified water is available in May and may be even up to the first of June. (See Finding of Fact 19.)

Other testimony indicates water is available may be to the first of August (See Finding of Fact 17) and yet even other testimony and exhibits indicate water maybe available even longer (See Findings of Fact 9 and 10).

9. Section 85-2-311(1)(b), MCA, states, "the water rights of prior appropriators will not be adversely affected". Testimony given by the Applicant indicates there will be no adverse effect to prior appropriators if this permit is granted. Objector Sutley believes that if the permit is granted it will affect his ability to exercise his right. The testimony given by the Objector had no substance. Based on this substantial credible evidence presented by the Applicant, it appears the Objector's rights will not be interfered with unreasonably. (See Findings of Fact 8, 9, 10, 17, 18, and 19.)

10. Objector Sutley presented evidence that clear cutting has occurred (Objector's Exhibit 1) and that water may run-off a little sooner than if a full tree stand was there. (See Finding of Fact 13.) There was also testimony given that the new tree growth is currently around six to eight feet (see Finding of Fact 14). From the testimony of Mr. Sutley and the Applicant, clear cutting may cause quicker run-off, but the new tree growth will continue and has already slowed some of the rapid run-off problem. I don't find the testimony convincing that since a quarter of the total number of acres in the drainage area have been clear cut that a quarter of the run-off is impacted.

11. It appears there is water available to the Objector if there were some changes in the design of his diversion (see Finding of Fact 18). It is the responsibility of a prior appropriator to change his method of operating if he can reasonably exercise his water right under the changed condition. § 85-2-401(1), MCA.

12. Because of testimony given by the Applicants, the acreage to be irrigated is being modified from 9.52 acres to 8.52 acres. Along with this would come a reduction in the total number of acre-feet required. The Applicant has asked for 2.5 acre-feet per acre to irrigate his project; therefore, I am modifying the total number of acre-feet requested from 23.8 acre-feet to 21.3 acre-feet. (See Finding of Fact 5.)

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 69717-s76D is hereby granted to Tom and Betty Wilson and John and Jan Wilson to appropriate 58 gallons per minute up to 21.3 acre-feet of water per year for the purpose of sprinkler irrigation on a total of 8.52 acres located in the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 05, Township 35 North, Range 27 West, MPM, all in Lincoln County, Montana. The source of water is Pinkham Creek, a tributary of Lake Koocanusa and shall be diverted for use from April 15 to September 15 inclusive of each year at a point in the N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 05, Township 35 North, Range 27 West, MPM, all in Lincoln County, Montana. This permit has a priority date of September 13, 1988 at 1:55 P.M..

This permit is issued subject to the following express terms, conditions, restrictions, and limitations.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department in issuing this permit, acknowledge any liability for damages caused by exercise of this

permit, even if such damage is a necessary and unavoidable consequence of the same.

C. If, at any time after this permit is issued, a written complaint is received by the Department alleging that Permittees' diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If, during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show-cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

D. This permit is subject to the condition that the Permittee shall install a continuous recorder in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume, including the period of time, of all water diverted from Pinkham Creek. Flow measurements shall be taken and recorded every two days and shall be submitted to the Department twice a year. The first report shall be due July 15 and the second on September 15 of each year. The report shall be sent to: DNRC - Water Rights Bureau Field Office, P. O. Box 860, Kalispell, MT 59903.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs..

DATED this 10th day of April, 1990.

T. J. Reynolds
T. J. Reynolds, Hearing Examiner
Department of Natural Resources and
Conservation
1520 East 6th Avenue
Helena, MT 59620-2301
(406) 444-6695

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served by mail upon all parties of record at their address or addresses this 10th day of April, 1990 as follows:

JOHN AND JAN WILSON
TOM AND BETTY WILSON
P. O. BOX 751
EUREKA, MT 59917

Harry D. Sutley
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Spring, TX 77379

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Rexford, MT 59930

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Irene V. LaBare
Legal Secretary